

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Edison Mission Energy)
on Behalf of Its Public Utility Subsidiaries)

Docket No. EC01-93-000

**REQUEST FOR REHEARING
OF THE
ILLINOIS COMMERCE COMMISSION**

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.713 (2000), the Illinois Commerce Commission ("ICC") hereby respectfully submits its Request for Rehearing of the Commission's Order issued May 14, 2001, in the above-captioned proceeding.

SPECIFICATION OF ERROR

The Commission erred by failing to consider the transaction's effect on reliability as a factor in deciding whether the Applicant's proposed restructuring satisfies the public interest standard of section 203 of the FPA, 16 U.S.C. §824b (2000).

BACKGROUND

On April 30, 2001, Edison Mission Energy ("EME"), on behalf of its public utility subsidiaries, filed an application pursuant to section 203 of the Federal Power Act ("FPA"), 16 U.S.C. §824b (2000), for a corporate restructuring. EME states that the purpose of the restructuring is to permit Edison International ("EIX"), which is the parent holding company of EME and its subsidiaries, to obtain funds to make payments on outstanding debt and to satisfy obligations made by EIX and its subsidiary Southern California Edison Company ("SCE") in a Memorandum of Understanding

(“MOU”) with the California Department of Water Resources. Application at 1-2. The corporate restructuring will achieve this purpose by creating a new corporate subsidiary (“NewCo”) to obtain financing secured by the common stock of EME, the proceeds of which will be transferred to EIX.

In particular, EME’s application provides that EIX will create NewCo to serve as an intermediate holding company between EIX’s direct subsidiary, The Mission Group (“TMG”), and TMG’s wholly-owned subsidiary EME. Under the proposal, NewCo would acquire all of the common stock of EME, thereby acquiring indirectly via EME’s stock the stock of all of EME’s public utility subsidiaries, which include Midwest Generation, LLC (“MidwestGen”). The application further provides that NewCo plans to secure new financing using its EME holdings as collateral. NewCo would then dividend the proceeds of the financing to TMG which would, in turn, transfer the funds to EIX through a loan. Application at 4-5.

By Order on May 14, 2001, the Commission approved EME’s Application as satisfying the public interest standard of section 203. In so doing, the Commission considered three factors: (1) the effect of the transaction on competition, (2) the effect of the transaction on rates, and (3) the effect of the transaction on regulation. The Commission did not consider whether the transaction would affect reliability.

The ICC has an interest in this transaction because MidwestGen owns generating plants that supply a substantial amount of capacity in the Midwest which, in turn, is utilized to serve a significant amount of load in Northern Illinois.¹ In determining whether EME has met the public interest standard, the Commission should ascertain that the reliable operation of MidwestGen’s generating plants is not

¹ MidwestGen “owns six coal-fired plants totaling 5,645 MW, a 2,698 MW dual-fueled generating station, and 71 dual-fueled peaking units at nine sites totaling 994 MW.” Application, att. A at 6.

placed at risk. Further, the ICC submits that the public interest standard requires the Commission to consider particular transactions' potential effects on reliability. Accordingly, the ICC respectfully requests that the Commission (1) rehear its May 14, 2001, decision to determine whether the transaction jeopardizes reliability in Illinois, which may require the Commission to direct EME to submit evidence that its proposed restructuring and associated financial transactions do not threaten reliability in Illinois, and (2) consider reliability as a factor to determine whether section 203 transactions satisfy the public interest on a going-forward basis.

ARGUMENT

I. THE COMMISSION SHOULD REHEAR ITS DECISION IN ORDER TO CONSIDER THE TRANSACTION'S EFFECT ON SERVICE RELIABILITY IN ILLINOIS.

Subsection 203(a) of the FPA provides as follows:

(a) Authorizations. No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of \$50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the commission authorizing it to do so. ... After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

16 U.S.C. §824b(a)(emphasis added). As can be seen, the statutory language clearly imposes a duty on the Commission to ascertain that proposed section 203 transactions satisfy the public interest. However, the statute does not identify with specificity the factors that the Commission is to consider in making such determinations. In the past, as the Commission did in this case, the Commission has fulfilled its statutory mandate by utilizing a three pronged test or, specifically, by considering proposed transactions' effects on (1) competition, (2) rates, and (3) regulation. 18 C.F.R. §2.26

(2000)(codifying Policy Statement, Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act, Order No. 592, 77 FERC ¶ 61,263(1996)).

The ICC respectfully urges the Commission to expand its list of relevant factors for section 203 determinations to include proposed transactions' effects on reliability. The Commission has broad discretion to consider all factors relevant to proposed transactions' compliance with the public interest. As noted above, section 203 does not enumerate the criteria that the Commission is required to consider but, instead, merely provides the general prescription that the Commission must find all transactions consistent with the public interest. The Commission must ascertain that proposed transactions satisfy the general prescription to be consistent with the public interest by considering all relevant factors.

In this case and all future cases, it is important for the Commission to consider proposed transactions' effects on reliability because of reliability's relevance to the public interest. The public has a significant interest in maintaining long-term, reliable energy sources. As the recent events in California make clear, the lack of reliable energy sources leads to significant disruptions of business and peoples' daily lives. Furthermore, the lack of sufficient reliable generation makes the development of competitive markets nearly impossible. One would find it difficult to argue that reliability is not a factor, or indeed perhaps the most significant factor, that determines whether the public interest is met in any single instance.

In fact, although section 203 does not list the factors that the Commission must consider in making its public interest determinations, subsection (b) thereof indicates Congress' intent that reliability be considered in section 203 reviews. In relevant part, subsection 203(b) provides as follows:

The Commission may grant any application for an order under this section in whole or in part and upon such terms and conditions as it finds necessary or appropriate to secure the maintenance of adequate service and the coordination in the public interest of facilities subject to the jurisdiction of the Commission.

16 U.S.C. §824b(b) (emphasis added). The most reasonable conclusion to draw from Congress' express authorization to the Commission to condition section 203 approvals to "secure the maintenance of adequate service" is that Congress intended the Commission to consider reliability as a factor in making its public interest determinations.

Also, even though the Commission has not generally considered reliability as a factor in evaluating proposed transactions under section 203, the Commission is not required to maintain the *status quo*. It is well established that the Commission has the authority to depart from prior precedent or settled policy as long as a reasoned analysis is provided that justifies the change. *See, Mobile Oil Corp. v. EPA*, 871 F.2d 149 (D.C. Cir. 1989)(finding that an agency's new interpretation of statutory language is entitled to deference "so long as the agency acknowledges and explains the departure from its prior views"). Indeed, section 2.26 of the Commission's Rules recognizes the Commission's ability to deviate from its precedent of only considering effects on competition, rates and regulation when conducting reviews pursuant to section 203. Rule 2.26 specifically states that the Commission "may consider other factors" in addition to the three aforesaid factors that the Commission generally considers to ascertain that proposed transactions satisfy the public interest. 18 C.F.R. §2.26(b).

Not only is the Commission authorized to make a reasoned departure from its past precedent to consider reliability as a factor, but the Commission could be perceived as acting arbitrarily and capriciously if it fails to consider reliability. A court reviews, under the arbitrary and capricious test, whether the agency engaged in reasoned decision-making, which includes whether the agency

considered all “relevant factors.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). In other words, adherence to past precedent may not result in reasoned decision-making if it does not permit, in any given instance, the Commission’s consideration of all relevant factors.

In this case, EME has not demonstrated that its proposed transaction will maintain generation supply availability and reliability in Illinois. The ICC respectfully requests that the Commission rehear its decision to determine whether the transaction affects reliability in Illinois, which may require the Commission to direct EME to submit additional evidence. The ICC further requests that the Commission include reliability as a factor for consideration in section 203 reviews on a going-forward basis.

WHEREFORE, for each and all of the foregoing reasons, the Illinois Commerce Commission respectfully requests that the Commission rehear its May 14, 2001, decision, include reliability as a factor to determine whether this and all future transactions satisfy the public interest, and for any and all other appropriate relief.

June 7, 2001

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Request for Rehearing of the Illinois Commerce Commission to be served this day upon each person designated on the official service list compiled by the Secretary in this proceeding, a copy of which is attached, in accordance with the requirements of Rule 2010 of the Commission's Rules of Practice and Procedure.

Dated at Chicago, Illinois, this 7th day of June, 2001.

Sarah A. Naumer
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Illinois Commerce Commission